No. 85-2151

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VASILIKI NISIOTAKIS, CONSTANDINOS NISIOTAKIS, and STELLA NISIOTAKIS, individually; CHRISTOS NISIOTAKIS, a minor, and KOSTAS NISIOTAKIS, a minor, by and through their Guardian ad Litem, EUGENE J. MARSHALL; as heirs of THEODOROS NISIOTAKIS, deceased,

Petitioners,

v.

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, a corporation
and

STENCEL AERO ENGINEERING CORPORATION, a subsidiary of TALLEY INDUSTRIES, INC., a corporation

Respondents.

BRIEF BY RESPONDENT ROCKWELL INTERNATIONAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RESPONDENT'S RULE 28.1 STATEMENT

Current Subsidiaries and Affiliates of Rockwell International Corporation

A.J. Sage and Co., Pty. Limited (Australia)
Amforge, Inc. (Illinois)
Arpel, S.A. (France)
Atomics International, Inc. (Delaware)
Audco-Rockwell Italiana S.R.L. (Italy)
Automotive Axles Limited (India)
Autonetics, S.A. (Mexico)
Autonetics, Inc. (Delaware)

Braseixos S/A (Brazil)
Brasprenas S/A (Brazil)

Camden Investment Trust, Limited (England)
Collins International Service Company (Texas)
Collins Radio Company (Iowa)
Collins Radio Company of Japan, Ltd. (Japan)
Collins Radio Constructors, Inc. (Texas)
Collins Systems International Inc. (Delaware)
Compagnie Industrielle de Mecanismes, S.A. (France)
Componentes Automotrices Rockwell-Standard y Compania Limitada (Chile)
Constantine Insurance Company, Ltd. (Bermuda)

Dina Rockwell Nacional S.A. (Mexico)
Draper Americas, Inc. (Massachusetts)

Electronic Fabriek N.V. (The Netherlands Antilles)
Europlastique S.A. (France)

Flexible, Inc. (Delaware)

Hills-McCanna Company (Delaware)

Ikegai-Goss Co. Ltd. (Japan)
Industrias Erlo, S.A. de C.V. (Mexico)
Industrias Teluq, S.A. (Spain)

Maine Electronics, Inc. (Delaware)
Manufacturers Leasing Associates XXXV (Maryland)
Metalurgica Carabobo, S.A. ("Metalcar") (Venezuela)
MGD Graphic Systems, Inc. (Switzerland)
Moligal Produtors de Assentos de Automovel, Limitada (Portugal)
M.P. O'Rourke Pty., Limited (Australia)

Narland Corporation (Delaware)
North American Aviation, Inc. (Delaware)
North American Rockwell Corporation (Delaware)
Nuad Corporation (Delaware)

PHI Magnetronics Limited (England)
Press Kogyo-Rockwell Co., Ltd. (Japan)

Recticon Corporation (Delaware)
Rocketdyne Corporation (Washington, D.C.)
Rocketdyne, Inc. (Delaware)
Rockitt, Ltd. (Oklahoma)
Rockwell Aerospace & Electronics, Inc. (Delaware)
Rockwell (Bermuda) Ltd. (Bermuda)
Rockwell Cerdans, S.A. (Spain)
Rockwell-Collins (Australasia) Pty. Ltd. (Australia)
Rockwell-Collins (Far East) Limited (Hong Kong)
Rockwell-Collins (U.K.) Limited (England)
Rockwell-Collins de Mexico, S.A. (Mexico)
Rockwell-Collins de Nogales, S.A. (Mexico)
Rockwell-Collins France S.A. (France)
Rockwell-Collins G.m.b.H. (Fed. Rep. of Germany)
Rockwell-Collins International, Inc. (Texas)
Rockwell-Collins Italiana S.p.A. (Italy)
Rockwell CVC OMEVI S.p.A.
Rockwell do Brasil Industria e Comercio Ltda. (Brazil)
Rockwell Financial Services Corporation (Delaware)
Rockwell Golde G.m.b.H. (Fed. Rep. of Germany)

Rockwell Golde Italiana S.p.A. (Italy)
Rockwell Graphic Systems Limited (England)
Rockwell Graphic Systems, Inc. (Delaware)
Rockwell International Corporation (Nevada)
Rockwell International Credit Corporation (Delaware)
Rockwell International Finance Corporation (Delaware)
Rockwell International G.m.b.H. (Germany)
Rockwell International Holdings Limited (Delaware)
Rockwell International Limited (England)
Rockwell International Manufacturing Pre. Ltd. (Delaware)
Rockwell International of Canada Ltd. (Canada)
Rockwell International Operations, Inc. (Delaware)
Rockwell International Overseas Capital Corporation (Delaware)
Rockwell International Overseas Corporation (Delaware)
Rockwell International Pension Trustees Limited (England)
Rockwell International S.A. (France)
Rockwell International S.A. (Switzerland)
Rockwell International Sales Corporation (Delaware)
Rockwell International Services Limited (England)
Rockwell International Systems, Inc. (Delaware)
Rockwell International Taiwan Company, Ltd. (China)
Rockwell International Trading Company (Delaware)
Rockwell International Ventures, Inc.
Rockwell Limited (Delaware)
Rockwell Manufacturing Company (Delaware)
Rockwell-Maudslay Limited (England)
Rockwell Mexicana, S.A. (Mexico)
Rockwell-Rimoldi da Amazonia, Industria e Comercio Limitada (Brazil)
Rockwell Rimoldi Espanola S.A. (Spain)
Rockwell Rimoldi France S.A. (France)
Rockwell-Rimoldi G.m.b.H. (Germany)
Rockwell-Rimoldi (Great Britain) Limited (England)

Rockwell-Rimoldi (Ireland) Ltd. (Ireland)
Rockwell-Rimoldi of America, Inc. (New York)
Rockwell-Rimoldi S.p.A. (Italy)
Rockwell Shuttle Operations, Inc.
Rockwell-Standard Corporation (Nevada)
Rockwell-Standard de Venezuela C.A. (Venezuela)
Rockwell Standard of Australia Limited (Australia)
Rockwell Systems Graphiques, S.A. (France)
Rockwell Thompson Limited (England)
Rockwell Transmission Company (Delaware)
Rockwell U.K. Limited (England)
Rockwell Valves International, Inc. (Delaware)
Rockwell Valves Limited (England)
Rockwell Valves S.A. (France)
Rockwell Walther Australia Pty. Ltd. (Australia)
Rockwell Western Trade Corporation (Delaware)
R.O.R. - Sevem S.A. (France)
Rubery Owen-Rockwell (Europa) B.V. (The Netherlands)
Rubery Owen-Rockwell (Manufacturing) Limited (England)
Rubery Owen-Rockwell Limited (England)
Ruedas de Venezuela S.A. (Venezuela)

Sapart, A.G. (Liechtenstein)
Saseb Ag Eschen (Liechtenstein)
SCI Aux Pres Renard (France)
S.C.I. Volta (France)
S.C.I. de Sully sur Loire (France)
Serrature Auto Ferroviarie Edili SpA. (Italy)
Serrature Auto Meridionali Stampi Attrezzature SpA. (Italy)
Setec S.p.A. (Italy)
Silvant Plastics Limited (England)
Smith-Blair Inc. (Ohio)
Societe d'Execution Rationelle de Mecanique Automobile S.a.r.L. (France)
Sumlock Anita Services Limited (England)

Taiwan Axle Company Limited (Republic of China)
Tamet Compania Anonima (Venezuela)
Truflo G.m.b.H. (Germany)
Tyseley Estates Limited (England)

USHA Telehoist, Limited (India)

W.B. Bumpers Limited (England)
Wescom-Alco Associates (Illinois)
Wescom, Inc. (Illinois)
Wescom Leasing Corporation (Delaware)
Wescom (U.K.) Limited (United Kingdom)
Western INternational Industries (California)
Wilmot Breeden Australia Nominees Pty. Ltd. (Australia)
Wilmot Breeden (Australia) Pty Limited (Australia)
Wilmot Breeden Continental, S.A. (Switzerland)
Wilmot Breeden Employees Trust Limited (England)
Wilmot Breeden Group Properties Limited (England)
Wilmot Breeden (Holdings) Limited (England)
Wilmot Breeden International, Inc. (Michigan)
Wilmot Breeden Limited (England)
Wilmot Breeden (Pressings) Limited (England)

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OPINIONS BELOW

Respondent incorporates the "OPINIONS BELOW" contained in Petitioner's brief and cites to those opinions in like manner.

OBJECTION TO JURISDICTION

28 U.S.C. § 2101(c) allows ninety (90) days after the entry of judgment or decree to apply for a writ of certiorari. The United States Court of Appeals for the Fourth Circuit on February 27, 1986 issued its decision affirming the granting of summary judgment in favor of Defendant Rockwell International Corporation, (App. A, pp. 1a-10a), and the ninety (90) days from this final decision had long since expired prior to June 30, 1986, when the petition for writ of certiorari was filed.

Petitioners filing a "suggestion" for hearing *in banc* to the United States Court of Appeals for the Fourth Circuit (App. B, pp. 11a-14a) did not affect the finality of the earlier decision nor did it toll the running of the ninety (90) day limitation. Rule 35(c), Federal Rules of Appellate Procedure.[1]

Based upon the foregoing, Respondent objects to jurisdiction on the grounds the petition for writ of certiorari was untimely. 28 U.S.C. § 2101(c).

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[1] On page 2 of their brief to this Court, Petitioners acknowledge under "JURISDICTION" that they filed on March 14, 1986 a "suggestion for hearing *in banc* to the United States Court of Appeals for the Fourth Circuit." Furthermore, the title of the pleading filed on said date makes it evident they were filing a suggestion for a hearing *in banc*, as opposed to a petition for rehearing. The title of the March 14, 1986 pleading read, "Petition Suggesting Hearing by the Court of Appeals In Banc under FRAP 35." (App. B, p. 11a). Rule 35(c), Federal Rules of Appellate Procedure, states in pertinent part as follows,

> "The pendency of such a suggestion whether or not included in a petition for rehearing *shall not affect the finality of the judgment of the Court of Appeals or stay the issuance of a mandate.*" (Emphasis supplied).

STATUTES INVOLVED

Respondent incorporates the statutes cited and quoted in Petitioner's brief, in addition to the following statutes:

28 U.S.C. § 1291 states as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292(b) states as follows:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1406(a) states as follows:

> (a) The district court of a district in which is filed a case laying venue in the wrong division

> or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. § 2101(c) states as follows:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT OF THE CASE

Plaintiffs/Petitioners in this action sought to recover damages for the alleged wrongful death of Theodoros Nisiotakis who was killed in an airplane accident near Calamata, Greece on July 8, 1977.

The action was originally filed in the Superior Court of the State of California on August 29, 1978. On November 2, 1981, Plaintiffs filed a separate suit in the Common Pleas Court of Franklin County, Ohio, and the action was later removed to the United States District Court for the Southern District of Ohio upon the petition of Defendant Rockwell International Corporation (hereinafter "Rockwell"). Also named as a Defendant in the Ohio suit was Stencel Aero Engineering Corporation (hereinafter "Stencel").

On May 12, 1982 Defendant Rockwell filed a motion for summary judgment on the grounds the action was barred by the Ohio two-year statute of limitations for wrongful death. On October 27, 1982 the Honorable

Joseph D. Kinneary entered an Opinion and Order denying Rockwell's Motion for Summary Judgment. (App. E, pp. 25a-32a). Judge Kinneary found that under Ohio choice of law rules the five-year Greek statute of limitations applied, and under the Greek statute the action was not time-barred as to Rockwell.

On December 1, 1982 Rockwell moved the district court to reconsider its denying Rockwell's Motion for Summary Judgment, or, in the alternative, that the Court certify the issues to the Sixth Circuit pursuant to 28 U.S.C. § 1292(b). After Plaintiffs filed a memorandum contra opposing these motions, including the motion to certify, on April 6, 1983 Judge Kinneary denied both the motion to reconsider and the motion to certify. (App. F, pp. 33a-35a).

On June 20, 1983 Stencel filed a Motion to Dismiss the action as to that defendant for lack of personal jurisdiction. On June 27, 1984 Judge Kinneary entered an Opinion and Order refraining from ruling upon Stencel's Motion to Dismiss until such time as Plaintiffs had an opportunity to request a transfer of the action pursuant to 28 U.S.C. § 1406(a) to some other forum where personal jurisdiction over Stencel may exist. (App. G, pp. 36a-43a, at pp. 42a-43a). On July 27, 1984 Plaintiffs voluntarily sought the removal of the entire action to the United States District Court, Western District of North Carolina, Asheville Division, and by Order dated July 31, 1984 Judge Kinneary granted the motion. (App. H, p. 44a).

On November 6, 1984 Rockwell moved for summary judgment on the grounds North Carolina law now governed and the action was barred by the two-year North Carolina statute of limitations. On November 9, 1984 Stencel filed a Motion for Judgment on the

Pleadings for lack of personal jurisdiction, lack of subject matter jurisdiction, insufficiency of process and service of process, failure to state a claim upon which relief may be granted, and a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, on the grounds the claim was barred by the North Carolina statute of limitations. On December 17, 1984 the Honorable Woodrow W. Jones issued his Judgment and Memorandum of Decision granting Defendants' motions for summary judgment and dismissed the action against Defendant Rockwell and Defendant Stencel with prejudice. (App. D, pp. 17a-23a).

Plaintiffs subsequently appealed Judge Jones' dismissal to the United States Court of Appeals for the Fourth Circuit. Because Rockwell had earlier been prevented from having the case reviewed by the Sixth Circuit following Judge Kinneary denying its original Motion for Summary Judgment, and because Judge Jones' decision represented a final decision as opposed to being interlocutory, Rockwell asserted in a cross-appeal and in further support of Judge Jones' dismissal, the original error by Judge Kinneary.[2]

On February 27, 1986 the Fourth Circuit affirmed Judge Jones' decision dismissing both Defendants Rockwell and Stencel. (App. A, pp. 1a-10a). The decision with respect to Rockwell was predicated upon

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[2] Judge Jones' decision assumed for sake of argument that there was a conflict between the Ohio and North Carolina laws for the commencement of a wrongful death suit and North Carolina governed. The cross-appeal asserted, in further support of the dismissal, there was no conflict, for Ohio also required all wrongful death lawsuits to be commenced within two years.

Ohio Supreme Court decisions and the mandate from the legislature of Ohio, all ignored by Judge Kinneary, requiring all wrongful death actions commenced in Ohio be filed within two years of the decedent's death.[3]

On March 14, 1986 Plaintiffs filed a "Petition Suggesting Hearing by the Court of Appeals *In Banc* Under FRAP 35." (App. B, pp. 11a-14a). The suggestion was denied on April 1, 1986, and Plaintiffs filed their Petition for a Writ of Certiorari on June 30, 1986.

ARGUMENT

I. Summary

The decision denying summary judgment by the United States District Court sitting in Ohio constituted a significant departure from established Ohio law and the decisions from the highest court for the State of Ohio. When Petitioner transferred the entire case from Ohio to North Carolina, the transferor court lost all jurisdiction, and the transferee court inherited

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[3] There is no dispute that the claim was filed in Ohio on November 2, 1981 more than four years after the death of decedent, Theodoros Nisiotakis. There is also no dispute that North Carolina law required the action be filed in North Carolina within two years from the date of death. By holding Ohio also required the action to be filed within two years from the date of death, there existed no conflict of law between the State of Ohio and the State of North Carolina, thus necessitating that the Fourth Circuit affirm Judge Jones' dismissal on the basis the commencement of the suit was untimely. The absence of a conflict between the laws of the two states made it unnecessary for the Fourth Circuit in its opinion to address the issue of whether Ohio law or North Carolina should govern following the transfer to North Carolina.

all orders of the transferor court, as if the action had been commenced in North Carolina and as if the North Carolina court had made the earlier decisions and orders. *Magnetic Engineering & Manufacturing Co. v. Dings Mfg. Co., infra*; and, *In Re Miller, infra.*

All interlocutory decisions became ripe for appeal upon the North Carolina District Court rendering a final decision when it granted Respondent's Motion for Summary Judgment and dismissed with prejudice all claims against Rockwell. The issues addressed in the cross-appeal were then properly before the Fourth Circuit in further support of the North Carolina District Court's decision.

Petitioners cannot, as they now advocate in their brief to this Court, seek and obtain the transfer of a case from one state to another and thereby bar Respondent's right to have a lower court's erroneous decision reviewed by a higher court.

II. The Fourth Circuit Court of Appeals Properly Reviewed and Interpreted the Law of the State of Ohio.

Petitioners are advancing the novel theory that by filing a motion and succeeding to transfer a case pursuant to 28 U.S.C. 1406(a), the transfer acts as a practical matter to bar Respondent's ability to seek review of an interlocutory order from a district court upon a final decision in the case. Notwithstanding their averments to the contrary, none of the authority cited by Petitioners support their argument.

The cases cited by Petitioners do not involve the situation where due to a transfer the court of appeals was reviewing a legal interpretation from a district court outside its circuit. In *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976), and *United*

States v. Durham Lumber Co., 363 U.S. 522, 4 L.Ed.2d 1371, 80 S.Ct. 1282 (1960), both courts of appeals had previously scrutinized the state law involved to determine whether the district court was correct in its interpretation. Neither decision stood for the proposition that the court of appeals was bound by the legal interpretation of state law made by the district court; instead, the cases address the scope of review by this Court. This was also the situation in *Propper v. Clark*, 337 U.S. 472, 93 L.Ed. 1480, 69 S.Ct. 1333 (1949). Petitioner's reliance upon *Anderson v. City of Bessemer*, ___ U.S. ___, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), is particularly misplaced, since the question involved was the proper scope of review by a court of appeals of a factual finding by the district court where there was no jury. The case *sub judice* does not concern a finding of fact by the Ohio District Court, but dealt with the District Court's legal interpretation of the law in the State of Ohio.

In cases brought in the federal courts under diversity of citizenship jurisdiction, the court is required to apply the conflict of laws principles of the forum state involving what constitutes a substantive, as distinguished from a procedural, issue, and to interpret the state law in a manner consistent with the highest court of that state. *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). With the sole exception of Judge Kinneary's interlocutory order in this particular case, no court in Ohio, state or federal, has ever upheld the proposition that a wrongful death action could be commenced in Ohio more than two years after the date of death. This was true both before and after the Ohio Wrongful Death Act was amended on February

5, 1982, and later deemed retroactive by the Ohio Supreme Court. *French v. Dwiggins*, 9 Ohio St.3d 32, 458 N.E.2d 827 (1984). The amendment to § 2125.02, O.R.C., did not change the substantive rights of any of the parties, nor did it change the previous intent and interpretation of the statute. The rewording simply made clear what had always been the mandate of the Ohio General Assembly—the two year time limitation is substantive as opposed to remedial in nature, it is a restriction qualifying and terminating the right of action, not merely a time limitation upon the remedy, and it applies to all causes of action filed in Ohio. *Sabol v. Pekoc*, 148 Ohio St. 545, 76 N.E.2d 84 (1947).

Judge Kinneary's decision further ignored that there was nothing in the borrowing language of § 2125.01, O.R.C., which excludes the concurrent application of the two-year time limitation in § 2125.02, O.R.C., either before or after it was amended. Despite recognizing the Greek time limitation was merely remedial, his decision further ignored the long established rule in Ohio that a remedial time limitation of another state or country never controlled in a case venued in Ohio, and that the foreign time limitation never controls where the foreign statute prescribes a longer period of time. *Howard v. Allen*, 30 Ohio St.2d 130, 283 N.E.2d 167 (1972); *Pinney v. Cummings*, 26 Ohio St. 46 (1875); and, *Myers v. Alvey Ferguson Co.*, 331 F.2d 223, 224 (6th Cir. 1964).

The Fourth Circuit Court of Appeals correctly recognized that the purpose of the borrowing language in § 2125.01, O.R.C., is to prevent a party coming to Ohio to enforce the wrongful death act of another state or country, when the cause of action had expired

in the other state or country due to the passing of its shorter time limitation.

The irony of Petitioner's argument to this Court (i.e., the Fourth Circuit should not consider the issue of what is the correct time limitation under Ohio law), is that when Respondent filed a motion with the District Court in Ohio asking it to certify the issue to the Sixth Circuit, Petitioners filed a memorandum contra strenuously objecting, and then later sought and obtained the transfer of the case outside the Sixth Circuit to North Carolina.

When plaintiffs sought and obtained the transfer of the case from Ohio to North Carolina under 28 U.S.C. § 1406(a), the entire case and all of the previous orders had transferred, including Judge Kinneary's interlocutory order denying the motion for summary judgment, as though they were the orders of the District court sitting in Asheville, North Carolina. *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866 (2nd Cir. 1950); *In Re Miller*, 485 F.2d 74 (5th Cir. 1973). As noted by the District Court in *United States v. City of Chicago*, 395 F.Supp. 329, 339-340 (N.D. Ill. E.D. 1975),

> "It appearing that the December 18 order was intended to be and is a preliminary injunction, the District Columbia court had continuing jurisdiction to modify it in any way for good reason . . . and that same authority traveled with the action when it was transferred here under 28 U.S.C. § 1404(a) . . . but now that the action is here [the district court in Illinois] the December 18 order is in law an interlocutory order of this court subject to modification at any time for good reason."

If there was not such a rule, it would allow a party to transfer a case to avoid appellate review of a favorable decision by a lower court, a proposition Petitioners are now tendering.

The case *sub judice* was properly before the Fourth Circuit pursuant to a final order. 28 U.S.C. § 1291; *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). The Fourth Circuit in considering the case was not limited to only those issues the district court based its dismissal.The court could consider all issues that supported the final decision, regardless of whether they were raised through a cross-appeal. *United States and Interstate Commerce Commission v. American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924); *Dandridge v. Williams*, 397 U.S. 471, 475-6 n.6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); and, *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 605 n.3 (D.C. Cir. 1978). Insofar as the issue on cross-appeal established that there was no conflict between the laws of the State of Ohio and North Carolina, and both states require a wrongful death action be commenced within two years from the date of decedent's death, the issues on cross-appeal supported Judge Jones' dismissal and were, therefore, properly before and considered by the Fourth Circuit.

The Petition before this Court is nothing more than Petitioner's erroneous disagreement with the interpretation of a state law. The procedural history of this case reveals Petitioners have engaged in an elaborate scheme of forum shopping that has seen them bring suit against Respondent and other defendants in three different states. Not only is this forum shopping "regrettable", but it is also regrettable that

Petitioners have continuously attempted to deny Respondent the opportunity to have an erroneous decision reviewed by a court of appeals. There is no merit to Petitioners present argument that they can hide behind this decision by transferring the case from one state to another and divest Respondent of its opportunity to later have the interlocutory opinion reviewed. The decision by the Fourth Circuit Court of Appeals was a correct interpretation of Ohio law, and consistent with all prior decisions and statutes for the State. It is precisely for the reason of producing judicial economy and uniformity that there is judicial review of lower court decisions, and Petitioners cannot thwart this purpose by engaging in the tactics they have employed throughout.

III. Petitioners Right to Bring Suit in Ohio Terminated With Their Decision to Wait in Excess of Four Years Before Commencing the Action, and There was No Denial of Due Process of Law

By the time Petitioners filed their lawsuit in Ohio for the wrongful death of Theodoros Nisiotakis, their right for claim in Ohio had long since expired. Neither the decision by Judge Jones, the action by the Ohio General Assembly amending Ohio's wrongful death act, nor the decision by the Fourth Circuit Court of Appeals denied them their rights, for these rights expired after the second anniversary of decedent's death.

The syllabus in *Sabol v. Pekoc, supra*, written in 1947, reflects what has been and continues to be the position of the Ohio General Assembly and the highest court in the State of Ohio—the two-year time limitation contained in the Ohio Wrongful Death Act is substantive, and after two years have passed from

the date of death, not merely the remedy, but the entire cause of action and the right to proceed cease to exist.

> "1. The provision of Section 10509.167, General Code, that 'except as otherwise provided by law, every such action [for wrongful death] must be commenced within two years after the death of such deceased person,' is a restriction qualifying the right of the action and is not merely a time limitation upon the remedy. (Paragraph one of the syllabus in *Pittsburg, C. & St. L. Ry. Co. v. Hine, Admx.*, 25 Ohio St., 629, approved and followed.)
>
> 2. Where a petition in an action for wrongful death shows upon its face that the action was not commenced within two years after such death, a cause of action is not stated and a demurrer to the petition should be sustained." *Sabol v. Pekoc, supra*, paragraphs 1 and 2 of the syllabus.

The only reason Petitioners lost the opportunity to commence an action in Ohio for the wrongful death of Theodoros Nisiotakis was due to their own dilatory tactics and inadvertence which resulted in them waiting in excess of four years before filing the lawsuit. Neither the Ohio General Assembly, the courts or this Respondent have done anything to deny Petitioners due process under the laws of Ohio or the United States, and Respondent would respectfully request this Court to dismiss this argument and deny granting a writ of certiorari.

CONCLUSION

The issues addressed by the Fourth Circuit Court of Appeals in its decision were properly before the court and correctly decided. The decision was consistent with all known laws and precedent in the State of Ohio dating from 1875 to present. The Petition for Writ of Certiorari represents nothing more than Petitioners disagreement with the Fourth Circuit's interpretation of the law of a state; it does not involve any constitutional issues or issues involving significant federal questions in conflict with one another or in conflict with the laws of a state. Based upon the foregoing, Respondent/Defendant, Rockwell International Corporation, would respectfully request this Court to deny granting a writ of certiorari.

Respectfully submitted,

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